

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEN WALTERS, JOHN BONILLA, in their
respective capacities as Trustees of the
OPERATING ENGINEERS HEALTH AND
WELFARE TRUST FUND, PENSION FUND
FOR OPERATING ENGINEERS, PENSIONED
OPERATING ENGINEERS HEALTH AND
WELFARE FUND, OPERATING ENGINEERS
VACATION AND HOLIDAY TRUST FUND,
NORTHERN CALIFORNIA PREAPPRENTICE,
APPRENTICE AND JOURNEYMAN
AFFIRMATIVE ACTION TRAINING FUND,
OPERATING ENGINEERS CONTRACT
ADMINISTRATION FUND FOR NORTHERN
CALIFORNIA, OPERATING ENGINEERS
INDUSTRY STABILIZATION TRUST FUND
AND OPERATING ENGINEERS MARKET
PRESERVATION TRUST FUND,

Plaintiffs,

vs.

STATEWIDE CONCRETE BARRIER, INC., a
California corporation; and CHARLES WELLS, an
Individual,

Defendants.

Case No. C 04-2559 JSW (MEJ)

REPORT AND RECOMMENDATION RE:
PLAINTIFFS' MOTION FOR DEFAULT
JUDGMENT

I. INTRODUCTION

Before the Court is plaintiffs Ken Walters, et al.'s ("Plaintiffs") Motion for Default Judgment, filed on February 2, 2005. After careful consideration of Plaintiffs' papers, relevant statutory and case authority, and good cause appearing, the Court hereby RECOMMENDS that the District Court grant default judgment against Statewide Concrete Barrier, Inc. and Charles Wells (collectively "Defendants")¹.

¹ The defendant, Charles Wells, is an individual who owns, operates and controls defendant Statewide Concrete Barrier, Inc. Collectively Defendants constitute a single employer for the purposes of the Default Judgment.

II. BACKGROUND

The Court incorporates the factual background of this case as set forth in Plaintiffs' moving papers. Plaintiffs are trustees of the Trust Funds named in the caption. Each of the Trust Funds is an employee-benefit plan organized pursuant to Sections 302(c)(5), 302(c)(6), 302(c)(9) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §§ 186(c)(5), (c)(6), (c)(9). The Trust Funds were created pursuant to the written collective bargaining agreements ("Master Labor Agreements") entered into between employers associations for the building and construction industry and the Operating Engineers Local Union No. 3 of the International Union of Operating Engineers ("Union").

Defendant Statewide Concrete Barrier, Inc. is a corporation with its principal place of business located in Oakland, California. At all relevant times, it has been an employer within the meaning of Sections 3(5) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1002(5), 1145, and an employer in the industry affecting commerce within the meaning of Section 3(1) of the LMRA, 29 U.S.C. § 185.

On September 30, 1993, Defendants and the Union entered into a collective bargaining agreement ("Bargaining Agreement") which incorporates, by reference, select provisions of the Master Labor Agreements in existence between the Union and the Associated General Contractors of California, Inc. ("Association"). As a member of the Association, Defendants agreed to comply with all the terms and conditions contained in the provisions of the Master Labor Agreements relating to the payment of employee benefit contributions to the Trust Funds. Defendants further agreed to be bound by all future terms negotiated between the Union and the Association, and to submit to periodic audits of appropriate trust records to ensure compliance and to allow Plaintiffs to verify the balance owing on such payments. The Bargaining Agreement between Defendants and the Union has never been terminated.

According to Plaintiffs, Defendants either failed, neglected, or refused to make timely benefit contributions as required under the terms of the Bargaining Agreement. Plaintiffs also believe that additional

1 contributions may be due and owing, but cannot confirm the amounts until Defendants submit to an audit
2 review.

3 Plaintiffs filed their Complaint, seeking compensatory damages for any unpaid contributions,
4 liquidated damages, interest, attorney fees and costs. In addition to the monetary relief sought, Plaintiffs also
5 seek an injunctive order directing Defendants to make accounting to Plaintiffs in order to verify and
6 substantiate any contributions outstanding and due. Since this action commenced, Defendants have failed to
7 respond to the Summons and Complaint served to them on February 9, 2005. Plaintiffs assert that
8 Defendants are operating as an ongoing business and are fully capable of making a court appearance should
9 they choose to do so. Default has been entered under Fed. R. Civ. P. 55(b)(1), and Plaintiffs now move
10 this Court to grant default judgment against Defendants pursuant to its authority under Fed. R. Civ. P.
11 55(b)(2).
12

13 **III. JURISDICTION**

14 When considering a motion for default judgement, the court must determine whether it has both
15 subject matter and personal jurisdiction over the case. *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) ("To
16 avoid entering a default judgment that can later be successfully attacked as void, a court should determine
17 whether it has the power, i.e., the jurisdiction to enter judgment in the first place."). Also in deciding
18 whether to grant or deny a default judgment, a court must assess the adequacy of the service of process on
19 the party against whom default is requested. *Board of Trustees of the N. Cal. Sheet Metal Workers v.*
20 *Peters*, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. January 2, 2001). Here, Defendants were served
21 with the Summons and Complaint on February 9, 2005. Furthermore, proper service of the Summons and
22 Complaint is uncontested.

23 This Court has subject-matter jurisdiction pursuant to Section 501(e)(1) of ERISA, 29 U.S.C. §
24 1132(e)(1) and Section 301(a)(c) of the LMRA, 29 U.S.C. §§ 185(a), (c) which expressly provides the
25 federal district courts a jurisdictional basis over any actions arising under a claim for the recovery of unpaid
26 or delinquent employee benefit contribution. In addition, defendant Statewide Concrete Barrier, Inc. was at
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all times a corporation, with its principal place of business located in Oakland, California. Moreover, Defendants conduct their business within the Northern District of California, and the events giving rise to this suit occurred within the Northern District of California. Therefore, the Court has personal jurisdiction.

IV. LEGAL ANALYSIS

The Federal Rule of Civil Procedure 55(b)(2) authorizes a court to order a judgment against a defendant following an entry of default that was made pursuant to Rule 55(a). The decision to grant or deny a plaintiff's motion for default judgment is within the court's sound discretion. *See Aldabe v. Adabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). However such judgments are appropriate where the defendant has never appeared in the action, its failure to defend is unexplained, and the plaintiff would suffer prejudice if the default were not entered. *See Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 367 (7th Cir. 1983).

The Ninth Circuit has enumerated several factors which the court may consider in exercising its discretion as to whether an entry of default judgment is proper: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim and the sufficiency of the complaint; (3) the sum of money at stake; (4) the possibility of dispute concerning material facts; (5) whether default was due to excusable neglect; and (6) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

In applying this discretionary standard, the factual allegations contained in the plaintiff's complaint will be taken as true, except for those relating to the amount of damages. *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

A. Possibility of Prejudice to the Plaintiff

The first *Eitel* factor considers whether the plaintiff will suffer prejudice if default judgment is not granted. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Here the parties entered into collective bargaining agreements, whereby Defendants were obligated to make timely contributions to Plaintiffs' trust funds. According to Plaintiffs, Defendants breached their obligations under the contract by failing to make any payments as required under the terms of the Bargaining Agreement. In

refusing to answer Plaintiffs' Complaint, Defendants are deemed to have admitted the truth of Plaintiffs' averments in the instant action. *See Phillip Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003). Because Defendants defaulted on their regular payment schedule, Plaintiffs have suffered damages not only in the delinquent amounts, but also any interest that would have accrued on the contributed funds. If default judgment is not entered in favor of Plaintiffs, Plaintiffs will be left with no alternative recourse against Defendants and would be unable to collect the amounts owed to them under the Bargaining Agreement. Thus, the failure to grant Plaintiffs motion for default judgement would result in substantial prejudice to Plaintiffs.

B. Substantive Merits and the Sufficiency of Plaintiffs' Complaint

The second factor in the *Eitel* analysis addresses the probability of the plaintiff succeeding on the merits of its underlying claim as it is set forth in the complaint. A party seeking default judgment must state a valid claim upon which it may recover. *PepsiCo*, 238 F. Supp. 2d at 1175. If the court finds that the plaintiff would have likely succeeded on the merits of its substantive claim had the defendant not defaulted, then default judgment would be appropriate. *See Aldabe*, 616 F.2d at 1089.

Title 29 U.S.C. § 1145 provides, in part, that, "every employer who is obligated to make contributions to a multiemployer plan under the terms of a collectively bargained agreement shall to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement." In the instant case, Plaintiffs brought this ERISA action pursuant to 29 U.S.C. §1132(g), which grants the fiduciaries of an employee-benefits fund a federal cause of action to enforce the employer's obligations imposed by 29 U.S.C. §1145. In order to prevail on a claim for unpaid contributions under an ERISA plan, a plaintiff must prove that: (1) the trust funds are a qualified multi-employer plan as defined by 29 U.S.C. §1002(37); (2) the defendant is an employer obligated to contribute under the plan's terms; and (3) the defendant failed to contribute in accordance to the plan. *Board of Trustee of the Sheet Metal Workers Health Care Plan of N. CA v. Gervasio Environmental Systems*, 2004 WL 1465719, at *2 (N.D. Cal. May 21, 2004).

1 Here, in their Complaint, Plaintiffs have alleged all the facts necessary to establish the elements of
2 their claim. Plaintiffs represent various health and welfare trust funds, and is a multi-employer employee
3 benefit pension plan within the meaning of 29 U.S.C. §1002(37). On September 30, 1993, Plaintiffs
4 entered into the Bargaining Agreement with Defendants. Under the Bargaining Agreement, Defendants
5 were required to make contributions to Plaintiffs' trust funds on behalf of their employees. Shortly
6 thereafter, Defendants failed to pay the amounts owing to Plaintiffs. Accepting all factual allegations as true,
7 the Complaint establishes that Defendants are in clear violation of the terms of the contract. Therefore
8 Plaintiffs have adequately demonstrated a substantial likelihood of success on the merits of their claim.

9 **C. Sum of Money at Stake**

10 The third *Eitel* factor assesses the reasonableness of the potential award if a default judgment is
11 entered against the defendant. Under this analysis, the court is directed to take into account the amount of
12 money at stake in relation to the seriousness of the defendant's conduct. *PepsiCo*, 238 F. Supp. 2d at
13 1176; *See also Eitel*, 782 F.2d at 1471. If the sum of money at issue is reasonably proportionate to the
14 harm caused by the defendant's actions, then default judgment is warranted. *See Board of Trustees of*
15 *Cal. Metal Trades v. Pitchometer Propeller*, 984 F. Supp. 978, 978 (N.D. Cal. 1997). The court may
16 further take into consideration whether "the amount of money at stake is reasonable, properly documented
17 and contractually justified." *See Board of Trustees of N. Cal. Sheet Metal Workers v. Peters*, 2000 U.S.
18 Dist. LEXIS 19065, at *5 (N.D. Cal. December 29, 2000).

19 In the instant action, the remedy sought by Plaintiffs is limited to the damages that would be
20 reasonably expected to put Plaintiffs in the same position had Defendants' contractual obligations been
21 fulfilled. These damages include (1) the unpaid contributions owing to them under the terms of the
22 Bargaining Agreement; (2) the interest that would have accrued on such amounts had they been paid; (3)
23 the liquidated damages as set forth and agreed upon by the parties in the Bargaining Agreement; and (4) the
24 attorney fees and other expenses representing the cost of enforcing Plaintiffs' contractual entitlements. All
25 these amounts have been documented by Plaintiffs and set forth in a declaration by Plaintiffs' counsel, James
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1 P. Watson. Defendants have not challenged the accuracy of the unpaid contribution. Furthermore,
2 Defendants have not disputed that an award of accrued interest or attorney fees would be unduly harsh.
3 Finally there is no indication that liquidated damages set forth under the Bargaining Agreement were
4 unreasonable or punitive.

5 Given the nature of Defendants' conduct in failing to pay the amounts owed, such resulting damages
6 are reasonable and would naturally be expected to flow from Defendants' breach of contract. Moreover,
7 because Plaintiffs only seek to recover the amount of money owed to them pursuant to the Bargaining
8 Agreement, the sum of money at stake is reasonably proportionate to the harm caused to them by
9 Defendants' breach.

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11 **D. Possibility of Dispute Concerning Material Facts**

12 The fourth *Eitel* factor considered the possibility of dispute as to any material facts of the case. In
13 refusing to answer Plaintiffs' Complaint, Defendants are deemed to have admitted the truth of Plaintiffs'
14 averments in the instant action. *See Phillip Morris*, 219 F.R.D. at 494. Upon the entry of default, all well-
15 pleaded facts in the complaint are taken as true, except those relating to damages. *See Televideo*, 826
16 F.2d at 917.

17 Here, Plaintiffs sufficiently alleged all the facts necessary to maintain their claim for relief under
18 ERISA. The allegations of Defendant's breach of Bargaining Agreement is supported by the signed
19 declaration of James P. Watson, who attested to the fact that Defendants have been delinquent in their
20 contributions at the time of the suit. Accordingly, the Court accepts all the factual allegations contained in
21 Plaintiffs' Complaint. Since Defendants have not made any attempts to challenge the accuracy of the
22 Complaint, there exists no dispute of material facts that would preclude the Court from granting Plaintiffs'
23 motion for default judgment.

24 **E. Possibility of Excusable Negligence**

25 The fifth *Eitel* factor contemplates the possibility that the defendant's default was the result of
26 excusable neglect. Under this analysis, the court considers whether the defendant was put on adequate
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1 notice to apprise them of the pendency of the action brought against it. *Phillip Morris*, 219 F.R.D. 494 at
2 500. In addition, the court also considers whether the circumstances surrounding the defendant's failure to
3 answer the complaint are sufficient to excuse or justify its default. *See Shanghai Automation Instrument*
4 *Co. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal. 2001) (no excusable neglect because defendant was
5 served with complaint and the notice of entry of default); *See also Pepsico*, 238 F. Supp. 2d at 1177
6 (because the defendant contacted the plaintiff's counsel to discuss settling the matter after being served with
7 the complaint, the defendant's acquiescence of the lawsuit precluded the possibility of excusable neglect);
8 *But See Eitel*, 782 F.2d at 1472 (defendant's failure to answer is excused because the parties were
9 engaged in settlement negotiations).

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11 In the instant case, Defendants were properly served with both the Complaint and the Notice of the
12 Motion for Default Judgment. Defendant Statewide Concrete Barrier Inc. is an ongoing business that has
13 not entered into bankruptcy or dissolved as a corporate entity. Consequently, Defendants are perfectly
14 capable of responding to any legal action. Despite Plaintiffs' numerous attempts to contact Defendants
15 regarding the pending action, Defendants, nevertheless, refused to answer the Complaint. Furthermore,
16 Defendants have resisted Plaintiffs' multiple requests for correspondence. Because Defendants were
17 properly served with the Notice of Motion for Default Judgment, and at all times, Defendants had the ability
18 and the reasonable opportunity to oppose such action, the possibility of excusable neglect is remote.

19 **F. Policy for Deciding on the Merits**

20 The final *Eitel* factor directs the court to consider the policy of the federal courts which ordinarily
21 disfavors the use of default judgments as the principal method of resolving disputes. As a general rule, in
22 civil actions, "cases should be decided on the merits whenever reasonably possible." *Eitel*, 782 F.2d. at
23 1472. However this preference alone is not dispositive; rather the court still has great latitude in exercising
24 its discretion with regards to the relative weight of the remaining *Eitel* factors. *Pepsico*, 238 F. Supp. 2d at
25 1177. Furthermore, the "defendant's failure to answer the plaintiff's complaint makes a decision on the
26 merits of a case impractical, if not impossible. *Id* at 1177. Because of this difficulty in proceeding in an
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1 action with an unresponsive party, “default judgments are more often granted than denied.” *PepsiCo v.*
 2 *Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999). As a consequence, the policy of encouraging
 3 decision of cases on the merits does not necessarily preclude a court from granting a default judgment when
 4 the defendant fails to respond.

5 Here, Defendants have refused to participate in the proceedings brought against them, despite
 6 adequate notice and opportunity to do so. Because the Court cannot reach the merits of the instant case
 7 without Defendants' participation, default judgement is appropriate despite the policy preferring decision to
 8 be made on the merits of a case. Accordingly the Court hereby RECOMMENDS that the District Court
 9 grant Plaintiffs' Motion for Default Judgment.
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11 V. REMEDIES

12 Generally a court has great discretion in determining damages; however any award in an ERISA
 13 action to collect delinquent contributions must be governed by 29 U.S.C. §1132, which considerably
 14 circumscribes the latitude given to courts in structuring an appropriate remedy. If the court enters a default
 15 judgment in favor of the plaintiff, an award under that section is mandatory, not discretionary. *Northwest*
 16 *Administrators, Inc. v. Albertson's Inc.*, 104 F.3d 253, 257 (9th Cir. 1996). When a judgment in favor
 17 of the plan is awarded the district court shall award the plan pursuant to 29 U.S.C. §1132(g)(2):

- 18 (A) the unpaid contributions;
- 19 (B) interest on the unpaid contributions;
- 20 (C) an amount equal to the greater of:
 - 21 (i) interest on the unpaid contributions, or
 - 22 (ii) liquidated damages provided for under the plan in an amount not in excess of 20
 percent (or such higher percentage as may be permitted under Federal or State
 law) of the amount determined by the court under subparagraph (A);
- 23 (D) reasonable attorney's fees and cost of the action, to be paid by the defendant;
- 24 (E) such other legal or equitable relief as the court deems appropriate.

25 These statutory remedies provide the exclusive remedies for actions to recover delinquent
 26 contributions. *Parkhurst v. Armstrong Steel Erectors, Inc.*, 901 F.2d 796, 797 (9th Cir. 1990).
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1 Under the language of the statute, an award pursuant to §1132(g)(2) is mandatory if the following three
2 requirements are satisfied: (1) the plan must provide for an such award; (2) the employer must be
3 delinquent at the time the action is filed; (3) the district court must enter a judgment against the employer.
4 *Northwest Administrators*, 104 F.3d at 257; *see also Parkhurst*, 901 F.2d at 797. In the instant case,
5 all the conditions necessary for an award under §1132(g)(2) are satisfied. Plaintiffs have shown that the
6 Bargaining Agreement contains specific provisions for calculating the contributions to be made as well as
7 the interest and liquidated damages to be paid in the event of delinquency. Since there is no dispute as to
8 the material facts alleged in this case, the Court accepts Plaintiffs' allegation that Defendants have failed to
9 pay their contributions in a timely fashion as required under the Bargaining Agreement. Therefore, because
10 the Court finds Plaintiffs' Motion for Default Judgement should be granted, the statutory damages
11 specifically provided by §1132(g)(2) are appropriate.

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13 Having determined that statutory damages are appropriate, the Court now looks to the amount of
14 the award requested. Generally, upon the entry of default by the court, the factual allegations in the
15 complaint are taken as true. *See Televideo*, 836 F.2d at 917. However, the same presumption does not
16 apply to the allegation of damages. *Id.* As a result, the plaintiff has the burden of proving up the damages
17 that it has purportedly sustained. *See Board of Trustees of Pipe Trades Dist. Council No. 36 v. Drexal*
18 *Power, Inc.*, 2004 U.S. Dist. LEXIS 15657, at *5 (N.D. Cal. July 26, 2004).

19 Here, Plaintiffs have failed to meet their burden of proof with respect to the amount of monetary
20 damages requested. The only proof offered in support of the requested relief is the declaration of James P.
21 Watson. This declaration merely affirms the amount and type of award demanded by Plaintiffs: \$14,019.14
22 of unpaid contributions; \$128,081.41 in liquidated damages accrued before the filing of the suit;
23 \$10,240.00 of additional liquidated damages accrued after the suit was filed; \$6,876.00 of prejudgment
24 interest; \$3,757.50 of attorney fees; and \$1,568.02 of total costs. This declaration, however, does not
25 provide the court with any real information as to how the submitted amounts were arrived upon.
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1 In their moving papers, Plaintiffs failed to specify the periods in which Defendants were believed to
2 be delinquent, and failed to enumerate the amounts of each delinquency. In addition, no accounting has
3 been offered showing the calculations of accrued interest and liquidated damages. Simply providing the final
4 monetary amount, without more, is not sufficient to meet the burden of proving damages.

5 With respect to Plaintiff's request for injunctive relief, the federal district courts are authorized by 29
6 U.S.C. §1132(g)(2)(E) to award other forms of legal or equitable relief as the court deems appropriate. In
7 this case, because Defendants have been unresponsive to Plaintiffs requests for audits as required under the
8 terms of the Bargaining Agreement, Plaintiffs did not have the opportunity to review Defendants' books and
9 records. Thus, the delinquencies submitted to the Court do not necessarily represent the total amount of
10 funds owed to Plaintiffs. In consideration of these circumstances, the Court recommends granting Plaintiff's
11 request for an injunctive order, requiring Defendants to submit to an audit of the appropriate trust fund
12 records so that Plaintiffs may ascertain the total amount of contributions owed.

14 VI. CONCLUSION

15 Based on the foregoing factors, Federal Rule of Civil Procedure 55(b)(2), statutory law, and case
16 law authority, the Court hereby RECOMMENDS that the district court GRANT Plaintiffs' Motion for
17 Default Judgment but STAY the effect of this judgement until the amount of damages can be determined
18 upon further production of information from Plaintiffs. The Court further RECOMMENDS that the District
19 Court GRANT Plaintiffs' request for injunctive relief and order Defendants to produce all books and
20 records necessary to conduct an audit under the terms of the Bargaining Agreement.

21 Pursuant to Federal Rule of Civil Procedure 72, a party may serve and file objections to this Report
22 and Recommendation within ten days of being served with a copy of said report.

23 IT IS SO RECOMMENDED.

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25 Dated: September 2, 2005

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28 MARIA-ELENA JAMES
United States Magistrate Judge